IN THE

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

BOISE ARTESIAN HOT & COLD WATER CO., Limited,

Plaintiff in Error,

vs.

BOISE CITY, IDAHO,

Defendant in Error.

Brief for Plaintiff in Error.

Upon Appeal from the United States Circuit Court for District of Idaho, Central Division.

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Counsel do not deem it necessary to call the Court's attention at any length to the points already discussed and presented in the main brief filed in this action. The court will notice, upon an examination of the Bill of Complaint and the answer thereto, that the material allegations of the complaint have been admitted by the answer; one or two of the facts stated therein which were denied were proven upon the trial, and the trial court in giving the peremtory instruction to the jury to find for the defendant, held in effect that the bill

of complaint therein, as a matter of law, did not state facts sufficient to constitute a cause o action against the Defendant. This ruling of the Trial Court in particular, counsel claim to have been erroneous for the following reasons:

First. In addition to the reasons and authorities cited in the main brief to the effect that the Plaintiff Company herein had the right to buy the franchise and property of its predecessor in interest therein, and transact its business under the same rights and obligations as rested upon the Eastman Bros., the original guarantees of said franchises, we call the court's attention to the fact that, in this State the Law recognizes that a franchise is private property, and also that property charged with a public use is also a private property. This being true, the Plaintiff Company and its predecessors in interest, had a right to transfer such property as the property of individuals is transferred;

Under the title of Eminent Domain defining what property may be was taken.

Sec. 5212 R. S. of Idaho, 1887, is as follows:

Sec. 5212. "The private property which may be taken under this title encludes * * * * * * * * * * * * * * * * *

3. Property appropriated to public use.

4. Franchises for Toll Roads, Toll Bridges, and Ferrys and all other franchises. There are only two kinds o corporations known to the Laws of Idaho.

Sec. 2575, R. S. Idaho, 1887, "Corporations are either pubic or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private."

The laws of Idaho Sec. 2642 R. S. 1887 provide, that the

franchises and all the rights and privileges thereof of corporations may be levied upon and sold, execution in the same manner and with like effect as any other property.

The power of the Plaintiff corporation to purchase the property and franchises of its predecessors in interest is conferred by Sec. 2633, R. S. Idaho, 1887, which provides as follows:

"Every corporation as such, has power * ** * * * * *

4th, to purchase, hold and convey such real and personal estate as the purposes of the corporation may require not exceeding the amount limited by this title. * * * * * * * * * *

8th. "To enter into any contracts or obligations essential, necessary or proper to the transaction of its ordinary powers or for the purposes of the corporation."

The above Statute is identical with the Statutes of California upon this subject, and in the case of San Luis Water Co. vs. Estrada, 117 Cal. 168, the Court held that under said Statute, a corporation had power to purchase property and franchises for the purposes of the corporation.

The Constitution of the State of Washington, Article 12, Sec. 8, providing, that if a corporation alienate its franchises, neither the franchise nor property held thereunder shall be relieved from liabilities incurred in the use of such franchis. This provision of the constitution is practically the same as the provisions of the Idaho constitution, Article 11, Sec. 15, "The Legislature shall not pass any law permitting the leasing or alienation of any franchise as to release or releive the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

And the Supreme Court of the State of Washington, in the case of Klostermon vs. Mason Co. R. Co. 36 Pac. 136, in the opinion of the court, in reference to the above provision of the Constitution say, "And the Constitution would seem to imply a right even to dispose of its franchise, but not in such a manner as to relieve the franchise or property held under it from certain liabilities of the grantor.

In addition to the Statutes heretofore cited granting power to a corporation to sell and dispose of its property, counsel ocntends that the Statutes of this State confer such power in direct terms upon the corporations. Under the title of general provisions applicable to all the Codes, Sec. 16, R. S. Idaho, 1887, Provides:

"Words used in these Revised Statutes in the present tense includes **the future** as well as the present. * * * * * * * The word person includes a corporation as well as a natural person. * * * * * * * * * * * * * * * "

Sec. 2827, R. S. Idaho, 1887, "Any person, whether a citizen or alien, may take, hold and dispose of property real or personal."

Under the above provisions of our Statutes, a corporation may sell and dispose of its property and franchises.

Williamette Woolen Mfg. Co. vs. Bank of B. C. 119 U. S. 191, 7 Sup. Ct. 187.
Hovelman vs. R. R. Co. 79 Mo. 632.
Klosterman vs. R. R. Co. 36 Pac. 136.
Commercial Electric Co. vs. City of Tacoma, 50 pac. 592.

In the case last cited, the Court says, "The next contention

of appellant's is that, regardless of Ordinance of 318, the Tacoma Electric Company had no authority, and consequently no power to assign its corporate privilegs and franchises to the respondent, for the reason that, without legislative authority, the grantee of a public or *quasi* public franchise cannot assign or sell the same; or, in other words, that a public or *quasi* public corporation cannot disable itself by contract from the performance of public duties which it has undertaken, without legislative consent."

The Tacoma Electric Company did not assign or transfer any franchise or privilege granted to it by the State. It simply assigned to respondent a privilege which the city, in plain terms, had granted to it and its assigns; and that right, in our judgement was included in that class of property which the statutes provides may be bought, held, mortgaged, sold and conveyed by a corporation organized in accordance with the laws of this state."

In People vs. Mutual Gaslight Co. 38 Mich, 154, it was held that the right of a gas company to lay pipes in a street under permission of a municipal government is not a state franchise, but a local easement, resting in contract or license."

Second. The city cannot question, in this proceeding, the right of the Plaintiff Company to own and hold its property and franchises; that this right can only be questioned in an action of proceeding brought for that purpose, and cannot inquire in to it collaterally.

Banks vs. Mathews, 98 U. S. 628.
Telegraph Co. vs. Telegraph Co., 22 Cal. 398.
Water Co. vs. Clarkin, 14 Cal. 544.
Oil Co. vs. Railroad Co. 32 Fed. 22.

Jones vs. Habersham, 2 Sup. Ct. Rep. 336; 2 Mor.

Savings & Trust Co. vs. Bear Valley Irr. Co. 112 Fed. 693.

Priv. Corp. 648 to 653 inclusive; also 709. 711. 746.

Again, the City is estopped to question this transfer as the record shows in 1891, the Boise Water Company, an Idaho corporation, transferred all its property and franchises to the Artesian Hot & Cold Water Company, and that for a period of about ten years, the City dealt with said corporation, made contracts with it, and never, at any time, questioned its right to become the successor of the Boise Water Works Company in its property and franchises; and that from the time of the acquisition by this Plaintiff company of this property and franchises up to the time of the commencement of this suit, the city had never questioned the right of this company to become the owner of its property and franchises. It is admitted by the pleadings that, the Artesian Hot and Cold Water Company, the immediate predecessor in interest of the complainant company of its property and franchises, caused such proceedings to be had in an action brought by it in the District Court of the Third Judicial District of the State of Idaho, Ada County, that the judgment and decree of said court has been made and entered therein dissolving said Idaho Company.

If the Defendant City herein intended to object to the right of the Artesian Hot & Cold Water Company to go out of the business or sell its franchise and property, in good faith it should have appeared in said action and objected or contested the right of said company to be dissolved or transfer its property and franchises. The laws of the State provide as follows:

Sec. 5185, R. S. Idaho, 1887, "A Corporation may be dissolved by the District Court of the County where its office or principal place of business is situated upon its voluntary application for that purpose.

Sec. 5188. "If the Judge is satisfied that the application is in conformity with this Title, he must order it to be filed with the Clerk, and that the Clerk give not less than thirty days notice of the application, by publication in some newspaper in the county, and if there are none such, then by advertisements posted up in three of the principal public places in the county."

Sec. 5189. "At any time before the expiration of the time of publication, any person may file his objections to the application."

In the case of Santa Rosa R. Co. vs. Central Street Ry. Co. decided by the Supreme Court of California, 38 Pac. 986, the Court says, "From the principles above laid down, it follows that no one but the government can avail itself of a ground of forfeiture of a public grant; and that the government, being the sole judge of the propriety of such action, may waive the right to enforce or declare a forfeiture. Such waiver may be by express legisative action, or may be inferred from other acts of the governmental authority. Accordingly, when the State, or any subordinate governmental body to whose charge the matter has been committed, after knowledge of the act or omission constituting a ground of forfeiture, does any act which unequivocally recognizes the franchise as still existing in force, a waiver of the forfeiture will be inferred. And if such act of recognition has the effect of causing the holder of the franchise to incur expense which he would not have incurred had the forfeiture been insisted on, or otherwise to change his position, the inference of a waiver becomes con-

clusive, on the ground of estoppel. These propositions are supported by an overwhelming weight of authority; indeed, no case to the contrary has been brought to our attention.

New Orleans, C. & L. R. Co. vs. City of New Orleans. 44 La. Ann. 748, 11 South, 77.
Chicago, R. I. & P. R. Co. vs. City of Joliet, 79 Ill. 25, 37;
City of Atlanta vs. Gate City Gaslight Co. 71 Ga. 106, 125.
State vs. Fourth N. H. Turnpike, 15 N. H. 162;
Martel vs. East St. Louis, 94 Ill. 67;
Trustees of McIntire Poor School vs. Zanesville C. &
State vs. Mississippi, O. & R. R. Co., 20 Ark, 495;
In re New York El. R. Co., 70 N. Y. 338;
State vs. Taylor, 28 La. Ann. 460.

"In the present case the acts of recognition by the city counsel of the continued existen ce of plaintiffs franchise have been numerous and unequivocal. For 14 years, of which at least 11 years were after the alleged ground of forfeiture had occurred, the city in every possible way, by direct dealing with plaintiff, by its public resolutions, orders and ordinances, and by its pleadings in a judicial proceeding, recognized paintiff's franchise as valid and in force, and insisted upon and took steps to enforce the obligations assumed by plaintiff by its acceptance of that franchise. In consequence of those official acts, plaintiff incurred expenses in paving the public street, in paying taxes, and in other ways, which it would certainly not have occurred had the alleged forfeiture been insisted upon."

Under the above authorities there can be no question but

what the defendant city was estopped to question of the right of the Artesian Hot & Cold Water Co., the immediate predecessor in interest of the complainant Company, to own, operate and control its property and franchises, as the city had recognized such right as admitted in the pleadings by entering into contracts with said company for the furnishing of water for fire and street sprinkling purposes for a number of years. This being true, then such a defense cannot be interposed successfully to the first cause of action set forth in complainant's complaint. A cause of action which accrued during the time the Artesian Hot & Cold Water Company (herein designated the Idaho Company) owned, operated and controlled these waterworks, there can be no question as to the right of said Idaho Company to assign such claim to the Plaintiff Company herein. Any claim which will survive to the personal representatives, can be assigned; and under the laws of this State, such a claim as the one sued upon herein, would survive.

Sec. 5552, R. S. Idaho, 1887, provides, "Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or inestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime."

"The power to assign and transmit to personal representatives are convertible propositions."

Bixbie vs. Wood, 24 N. Y. 607.
Dininny vs. Fay, 38 Barb. 18.

"All such rights of action for a tort as would survive to the personal representatives may be assigned."

Tyson vs. McGuineas, 25 Wis. 660.

"Whatever choses in action are transmissible by operation of law are assignable in equity."

Grant vs. Ludlow, 8 Ohio State, 37.

"The better opinion is that a claim arising out of a tort which affects the estate of a person may be assigned, though the rule is otherwise when it arises out of an injury to the person."

Dalms vs. Sears, 13 Or. 47.

"The exception to assignability of choses in action is confined to the wrongs done to the person, the reputation or the feelings in the injured party and to contracts of a purely personal nature, like promises of mariage."

Meech vs. Stoner, 19 N. Y. 29.
John vs. Farwell Co. vs Josephson, 37 L. R. A. 138.

Under the authorities above cited, the city cannot question in this proceeding, the right of the complainant company to take this claim by assignment. And in addition to above authorities, I call the court's attention to the last case cited, a case decided by the Supreme Court of Wisconsin, in the opinion of the court I find the following:

"The record shows that plaintiff is a corporation organized for the purpose of carrying on a general dry-goods business. The point was raised on the trial, and preserved for review, that it did not possess power to acquire by assignment claims for damages in no way connected with its own affairs growing out of the alleged conspiracy to defraud. It does not appear that such claims were in any way necessary to the preservation or enforcement of plaintiff's original claim or that such

purchase was to effect in any way the purposes of its organization, so as to bring its action in that regard within the rules that a corporation may, to preserve its own property and protect its legitimate interests, acquire and enforce liens which would otherwise be outside of the purposes of its organization. A corporation has only such powers as its organic act, charter, or articles of organization confer. This is elementary, but it includes such powers as are reasonably necessary to effect all the generall purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state. From the foregoing, without further discussion, we must hold that plaintiff had no authority to acquire by purchase the various claims for damages on which a recovery was had. But it by no means follows that its want of power can be taken advantage of by the respondents in this action. Formerly want of corporate power was an effective weapon, both for defense and attack, in the hands of private parties; but, without any change whatever respecting the general doctrine of ultra vires as applied to the acts of corporations acting outside the purpose of their creation, there has been a gradual development in the direction of holding that none but a person directly interested in the corporation, or the state, can question such authority. Such development from the rigorous rule which anciently obtained was manifested earliest in the adoption of the rule that, where a corporation has violated its charter in the purchase and requirement of real estate, its title thereto and right to enjoy the same cannot be inquired into collaterlly in actions between private parties or between the corporation and private parties; that it can be questioned only by the state." (See cases cited in opinion of the court.)

But the certificate of incorporation of plaintiff company in direct terms authorizes it to purchase the claim sued upon.

"* * * and of acquiring, using owning and operating all the properties, franchises, rights, claims, privileges and everything pertaining to that certain corporation of the State of Idaho known as "The Artesian Hot and Cold Water Company, Limited, and to be the successor in every respect of said corporation" (Transcript page 94.).

Sec. 2711, R. S. Idaho, 1887, provides, "All corporations formed to supply water to cities or towns, must furnish pure, fresh water to the inhabitants thereof for family use, so long as the supply permits, at reasonable rates and without distinction of person, upon the proper payment therefor, and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge.

The above Statute the court will see requires two things of the corporation: First. To furnish water to the inhabitants of the city so long as the supply permits. Second. To furnish water to the extent of their means in case of fire or other great necessitiy.

Counsel contends that the court erred in giving the peremptory instruction to find for the defendant, in this case, for the reason that the Plaintiff Company alleges in its complaint that, it was beyond its means to furnish water for street sprinkling purposes. The allegation of the complaint in this regard was, not only admitted by the defendant city, but was also proven as a fact upon the trial. This being true, we contend that we had a right to have the jury pass upon the question as to whether or not it was within the means of the company to furnish this water.

Sec. 3, Article 15 of the Constitution of Idaho, provides:

"The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Under the laws of this State, we contend, that if the waters used for domestic and agricultural purposes is sufficient to exhaust the supply, that, then, and in that event, the city cannot take water for street sprinkling purposes and compel the plaintiff corporation to enlarge its plant at great expense, and to operate the same at large cost by pumping water into its mains, that the City may withdraw the same in any amount it sees fit and sprinkle the streets therewith.

It is admitted by the pleadings that, for sprinkling streets at all times since March, 1900, and prior to August 23, 1901, the city took each day from the said water works system of said Idaho Company, water to the amount of over 250,000 gallons, and to furnish said water into its pipe lines whence it was taken, cost the said Idaho company over $55.00 each day of said taking, and $39.00 per day over and above that the Company's daily expenses would otherwise have been, and that said water was reasonably worth then and there 12½ cents per 1,000 gallons and worth that much to the said city. (par. 18 of the Complaint; Page 15 of the Tr.)

B. S. Howe, the secretary of the complainant company, testified, page 91 of the transcript, as follows, "As to the ability and power of furnishing water by the Artesian Hot & Cold Water Company, during the year 1901, our gravity supplies were 104,000,000 gallons a year, and all the rest we had to pump; all that was furnished beyond that amount had to be pumped from wells. Our gravity flow was sufficient outside of lawn sprinkling in summer, to furnish water for domestic purposes; taking in the lawn, it was not sufficient during the summer months. Provided no water had been used for sprinkling in the summer months of 1901, it would have required on an average, 400,000 gallons a day to be pumped. On account of the water taken by the city for sprinkling purposes it would take a difference of about five hours a day of pumping during the sprinkling season. In 1900, I can't exactly tell, but it required about ten per cent less extra pumping for sprinkling during that season. All the cold water that was used for sprinkling the streets was obtained by pumping. The power that runs our pump is steam-power; we use coal for fuel. It took about five hours more pumping last year every day to supply the water that was used for sprinkling the streets."

Does not the above state of facts show conclusively in this action that it was beyond the means of the plaintiff corporation and its predecessors in interest, to furnish the city water for street sprinkling purposes? Should not the plaintiff at least have had the right to submit this question as a question of fact to the jury for their consideration, or will this court say that the language of our Statute "to the extent of their means" has no limitation whatever, or that they must furnish this water to the full extent of the financial resources of the

company and its stock-holders, or that it must cease business and not even supply water for domestic purposes?

We are confident that the language of the Statute does not mean or sustain this construction which was the construction placed upon it in effect by the Trial Court.

It is admitted by the pleadings that, at no time prior to 1900, did the city ever take or procure from the predecessors in interest of the complainant company, water for sprinkling the streets, free of charge. That contracts had been made by the city with the Water Company for water purpose; and that the contracts had been faithfully carried out and were approved by the city; and that water used for this purpose had always been paid for. That to carry out these contracts, it became and was necessary, and that said company was obliged to, and did go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand-pipes, in the increasing of its pumping plant, in the purchasing of steam boiler, engine and pump, and in various other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said waterworks for all other purposes than street sprinkling, and such said extra expense was incurred in the pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such cotinuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street purposes was conceded, acquiesced in, and respected by the defendant and by all persons ; and defendant contracted

thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collecting the same both by legal proceedings in the courts and otherwise."

It is also admitted in the pleadings Par. 16, of the Complaint, Page 13 of the Tr., "That the Idaho Company had a several and separate contract with said city for each of the years 1896, 1897, 1898 and 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the city agreed to pay to the said water company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city."

The defendant city, as shown by the above admission, having by its contract and dealings with the Idaho company, induced it to make the large expenditures above set forth in reliance upon its contract to pay for water, will not now be permitted after such expenditure has been made, and in reliance upon which, the water company enlarged and extended its waterworks to claim and take without compensation the water so supplied by the waterworks company free of charge; and in this connection, I call the court's attention to the case of Illinois Trust & Savings Bank vs. Arkansas City 76 Fed. 271.

And in the opinion of the court, the court say, "There is another conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the

representations of the existence and of the execution of this contract, which it records and its conduct have constantly made, and in reliance upon which, the gas company and the water company constructed and extended the waterworks, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he had purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and ffraud.

Paxon vs. Brown, 27 U. S. App. 49, 60, 10 C. C. A. 135, 143, and 61 Fed. Rep. 874, 881;
Pence vs. Arbuckle, 22 Minn. 417;
Cairncross vs. Lorimer, 3 Macq. H. L. Cas. 827, 829;
Dickerson vs. Colgrove, 100 U. S. 578, 582.25 L. ed. 618, 620;
Faxon vs. Faxon, 28 Mich. 159;
Kirk vs. Hamilton, 102 U. S. 68, 75, 26 L. ed.79, 81;
Evans vs. Snyder, 64 Mo. 516.

This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in Zabriskie vs. Cleveland, C. & C. R. Co. 64 U. S. 23 How. 381, 400, 401, 16 L. ed. 488, 497, 498, in which the supreme court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted

the circulation of bonds that carried it; "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

Re Omaha Bridge Cases, 10 U. S. App. 98, 188, 190, 2 C. C. A. 174, 239, 240, and 51 Fed. Rep. 309, 326, 327;

Butler vs. Cockrill, 20 C. C. A. 122, 73 Fed. Rep. 945.

In a business transaction like that of procuring the construction of waterworks and the use of the water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations.

Safety Insulated Wire & C. Co. vs. Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. Rep. 140, 143, 25 U. S. App. 166;

San Francisco Gas Company vs. San Francisco, 9 Cal. 453, 468, 469, 471;

Columbus Waterworks vs. Columbus, 48 Kan. 99, 113, 15 L. RA 354;

Fergus Falls Water Co. vs. Fergus Falls, 65 Fed. Rep. 586, 591;

National L. Ins. Co. vs. Huron Bd. of Edu. 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. Rep. 778;

National Tube Works Co. vs. Chamberlain, 5 Dak. 54;

Com. vs. Philadelphia, 132 Pa. 288;

New Orleans Gaslight Co. vs. New Orleans, 42 La. Ann. 188, 192.

Tacoma Hotel Co. vs. Tacoma Light & W. Co. 3 Wash. 316, 325, 14 L. R. A. 669;

Wagner vs. Rock Island, 146 Ill. 139, 21 L. R. A. 519;

Vincennes vs. Citizens Gaslight Co. 132 Ind. 114, 126, 16 L. R. A. 485;

Indianapolis vs. Indianapolis Gaslight & C. Co. 66 Ind. 396, 403; State, Read, vs. Atlantic City, 49 N. J. L. 558, 562."

Counsel has been unable to find any case where this statute requiring a corporation to furnish water to the extent of its means, free of charge, for fire or other great necessities, has ever been held to apply to corporations supplying water from Artesian Wells developed upon the private property of the corporation; or where water has been supplied by means of pumping, at great expense to the corporation. All the cases where this or similiar statutes have been held to apply to water corporations, were cases in which the water was appropriated from the public waters of the state, and taken out or diverted by means of canals or aqueducts.

Suppose the paintiff corporation and its predecessors in interest was, and had been, supplying the city with water from a public stream by means of a canal or aqueduct, if the contention of the city be correct, then and in that event, the city would have as much right to demand of the corporation, if the supply carried was only sufficient for domestic purposes, that the corporation proceed at great expense and enlarge its ditch or canal in order to meet the needs of the city for street sprinkling purposes, as it has in this case, to

demand that the company at the expense of $39.00 a day, as admitted by the pleadings, continue to pump water into and through its mains in order that the city may have free water to sprinkle its streets. It seems to counsel that, the mere statement of this proposition is sufficient to demonstrate that the statute or that the legislature in enacting the same, never intended or contemplated any such results.

These sections of our statute involved in this case, have been passed upon by the Supreme Court of Idaho in the cases of:

> The Bellevue Water Co. vs. City of Bellevue, 36 Pac. 693, and City of Boise vs. Artesian Hot & Cold Water Co. 39 Pac. 562.

From a careful reading of these cases, I think the court will be convinced of the right of the plaintiff company to recover in this action. The last case cited was a case in which the defendant city herein, brought an action against the Artesian Hot & Cold Water Co. (The predecessor in interest of the Plaintiff Company) to compell it to furnish water, free for fire purposes. And the Supreme Court of this State held that, the water company, not having been previously authorized by ordinance or by contract with the city, to supply water to the town, as provided by Sec. 2710, that the company was under no obligation to furnish the water for such purposes. But if the corporations had no power, without such ordinance or contract, to furnish water to the city for these purposes, it does not follow that the city can therefore take the water of these corporations and refuse to pay for it after they had the benefits of it, even, of the corporation is not authorized to deliver water

to the city for these purposes; the water yet remains as the private property of the corporation, the city cannot steal it, or forcibly appropriate it and thereafter refuse to pay for it.

The other questions involved in this case have been discussed at length in the brief filed by the senior counsel herein, and I do not deem it necessary to again take up the time of the court with those questions, and, satisfied that error was committed by the trial court in the matters hereinbefore set forth, for which the judgment should be reversed and a new trial awarded.

Respectfully submitted,

ALFRED A. FRASER,
Of Counsel for Plaintiff in Error.